Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 22 AUGUST 3, 1988 No. 31

This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

The abstracts, rulings, and notices which are issued weekly by the U.S. Customs Service are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Customs Service

Treasury Decisions

(T.D. 88–41)

BONDS

APPROVAL TO USE FACSIMILE SIGNATURES AND SEALS

The use of facsimile signatures and facsimile seals on Customs bonds by the following corporate surety has been approved effective July 15, 1988.

Phoenix Assurance Company of New York

Authorized facsimile signatures on file for:

John J. Sheppard
James M. Gorman
John K. Daily
Bruce S. Haskell
Lee V. Barther

The Customs Service has been provided with a copy of each signature that is to be used, a copy of the corporate seal, and a certified copy of the corporate resolution agreeing to be bound by the facsimile signatures and seal. This approval is without prejudice to the surety's right to affix signatures and seals manually.

Dated: July 15, 1988.

File: 220510.

JOHN DURANT,
Director,
Commercial Rulings Division.

(T.D. 88–42)

SYNOPSES OF DRAWBACK DECISIONS

The following are synopses of drawback rates issued December 3, 1986, to July 30, 1987, inclusive, pursuant to Subpart C, Part 191, Customs Regulations.

In the synopses below are listed for each drawback rate approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the statement was signed, the basis for determining payment, the Regional Commissioner to whom the rate was forwarded or issued by, and the date on which it was issued.

(DRA-1-09)

Dated: July 18, 1988.

File: 220724

JOHN DURANT,
Director,
Commercial Rulings Division.

(A) Company: Adams Packing Association, Inc.
Articles: Grapefruit juice from concentrate; frozen concentrated grapefruit juice; bulk concentrated grapefruit juice
Merchandise: Concentrated grapefruit juice for manufacturing
Factory: Auburndale, FL
Statement signed: June 12, 1987
Basis of claim: Used in
Rate forwarded to RC of Customs: Miami, July 30, 1987

(B) Company: American Cyanamid Co.
Articles: Catalysts
Merchandise: Molybdic oxide
Factories: Azusa, CA; Michigan City, IN
Statement signed: April 28, 1987
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New York, July 14, 1987

(C) Company: BASF Corp.
Articles: Styropor® expandable polystyrene
Merchandise: Styrene
Factory: Jamesburg, NJ
Statement signed: August 22, 1986
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, July 14, 1987

(D) Company: BASF Structural Materials, Inc., Celion Carbon Fibers Div.
Articles: Carbon fibers
Merchandise: Polyacrylic nitril fibers called Precursor of different filament counts
Factories: Rock Hill, SC; Summit, NJ
Statement signed: November 28, 1986
Basis of claim: Used in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): New York, February 6, 1987
Revokes: T.D. 84–154–C to cover successorship from Celanese Corp.

(E) Company: Barrett Carpet Mills, Inc.
Articles: Twisted and heatset bulked continuous filament nylon carpet yarn; tufted broadloom carpet
Merchandise: Nylon yarn
Factory: Dalton, GA
Statement signed: May 18, 1987
Basis of claim: Used in
Rate forwarded to RC of Customs: Miami, July 30, 1987

(F) Company: Borg-Warner Chemicals, Inc.
Articles: Plastic resin in pellet form
Merchandise: Resins in powder form; polyphenylene ether copolymer
Factories: Oxnard, CA; Ottawa, IL; Washington, WV
Statement signed: May 5, 1986
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, June 9, 1987
Revokes: T.D. 85–1–D

(G) Company: Carpet Industries of North America
Articles: Wool carpet
Merchandise: Wool carpet yarn
Factory: Adairsville, GA
Statement signed: April 1, 1987
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New York, July 14, 1987

(H) Company: EBCO Manufacturing Co.
Articles: Pressure and bottle water coolers; dehumidifiers; handitappers; refrigerators; various accessory and replacement kits
Merchandise: Brass strip and tube; steel; component parts
Factory: Columbus, OH
Statement signed: May 14, 1987
Basis of claim: Appearing in
Rate forwarded to RCs of Customs: New York and Chicago, June 23, 1987

(I) Company: East Penn Manufacturing Co., Inc.
Articles: Batteries; lead plates; posts; connectors; terminals; and jumpers
Merchandise: Lead (corroding grade)
Factory: Lyon Station, PA
Statement signed: May 20, 1987
Basis of claim: Used in
Rate forwarded to RC of Customs: Boston (Baltimore Liquidation): June 23, 1987

(J) Company: Eveready Battery Co., Inc.
Articles: Dry cell batteries; socket terminals, electrodes, top and bottom battery covers
Merchandise: Nickel-plated steel strip; electrolytic tin-plated steel; snap fasteners (sockets and studs); nickel-plated brass eyelets; nickel-plated steel electrode caps; laminated phenolic plate paper base; electrolytic manganese dioxide, battery grade, unwrought zinc (slab and ingot for melt); polycylpentadiene P–3 resin; separator paper; lithograph steel
Factories: Cleveland and Fremont, OH; Asheboro (2) and Greenville, NC; Red Oak, IA; Maryville, MO; St. Albans and Bennington, VT
Statement signed: September 30, 1986
Basis of claim: Appearing in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): New York, December 3, 1986
Revokes: T.D. 85–41–W to cover successorship from Union Carbide Corp.

(K) Company: FMC Corp.
Articles: Standardized carrageenan extracts
Merchandise: Unstandardized carrageenan extracts
Factory: Rockland, ME
Statement signed: August 15, 1986
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, July 8, 1987

(L) Company: Glyco Inc.
Articles: Ethylene bis stearmide (Acrawax)
Merchandise: Ethylene diamine
Factory: Williamsport, PA
Statement signed: January 30, 1987
Basis of claim: Used in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): New York, March 23, 1987
Revokes: T.D. 78–258–K to cover successorship from Glyco Chemicals, Inc.

(M) Company: Greater Buffalo Press, Inc.
Articles: Ink base, flexographic, letter press, and offset printing inks
Merchandise: Pigments
Factory: Sheridan, NY
Statement signed: March 11, 1987
Basis of claim: Used in
Rate forwarded to RC of Customs: Boston, July 15, 1987

(N) Company: Howard Carpet Mills, Inc.
Articles: Finished carpeting
Merchandise: Bulk continuous filament polypropylene yarn
Factories: Chatsworth and Eton, GA
Statement signed: April 21, 1987
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, June 19, 1987

(O) Company: Kama Corp.
Articles: Oriented polystyrene sheets, oriented polystyrene regrind; oriented polystyrene repelletized
Merchandise: Styrene monomer (liquid)
Factory: Hazleton, PA
Statement signed: April 10, 1987
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, June 5, 1987
Revokes: T.D. 81–78–R

(P) Company: Eastman Kodak Co.
Articles: Blended photographic grade gelatin; sensitized photographic films and papers in rolls; finished photographic films and papers in rolls or sheets
Merchandise: Emulsion photographic grade gelatin, type B
Factories: Rochester, NY; Windsor, CO
Statement signed: September 3, 1986
Basis of claim: Appearing in
Rate forwarded to RC of Customs: Boston, June 15, 1987

(Q) Company: Lawless Container Corp.
Articles: Corrugated paperboard sheets, cartons, and shipping containers
Merchandise: Corrugating medium, linerboard
Factory: N. Tonawanda, NY
Statement signed: June 5, 1987
Basis of claim: Used in, less valuable waste
Rate forwarded to RC of Customs: Boston, July 14, 1987

(R) Company: Magnetek, Inc., Universal Manufacturing Div.
Articles: Lamp ballasts and parts thereof
Merchandise: Electrical steel; cold rolled lamination steel; cold rolled carbon steel; and slit steel of the above types
Factories: Paterson, NJ; Mendenhall and Vicksburg, MS; Blytheville, AR
Statement signed: March 24, 1987
Basis of claim: Appearing in
Rate issued by RC of Customs in accordance with § 191.25: New York, April 28, 1987
Revokes: T.D. 80–200–Y to cover a change in name from Universal Manufacturing Corp.

(S) Company: NF&M International Inc.
Articles: Finished titanium bars, billets and plates
Merchandise: Titanium ingots, billets and bars
Factory: Monaca, PA
Statement signed: January 14, 1987
Basis of claim: Used in, less valuable waste
Rate issued by RC of Customs in accordance with § 191.25(b)(2): New York, March 4, 1987
Revokes: T.D. 84–208–0 to cover successorship from NF&M International

(T) Company: National Refractories & Minerals Corp.
Articles: Basic refractory products
Merchandise: Refractory magnesia including dead-burned magnesite commonly known as Periclase
Factories: Columbiana, OH; Moss Landing, CA; Merrillville, IN
Statement signed: October 6, 1986
Basis of claim: Appearing in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): New York, December 15, 1986
Revokes: T.D. 73–26–N to cover successorship from Kaiser Aluminum & Chemical Corp.

(U) Company: O-Ryan Carpet, Inc.
Articles: Carpet, finished
Merchandise: Bulk continuous filament olefin yarn
Factory: Chatsworth, GA
Statement signed: May 21, 1987
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New York, July 30, 1987

(V) Company: Osmose Wood Preserving, Inc.
Articles: Wood preservatives
Merchandise: Cupric oxide
Factories: Tangent, OR; Woodstock, TN
Statement signed: October 24, 1986
Basis of claim: Used in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): New York, December 15, 1986
Revokes: T.D. 81–222–Q to cover successorship from Osmose Wood Preserving Co. of America, Inc.

(W) Company: Pfizer, Inc.
Articles: Penicillin and penicillin blends
Merchandise: Benzylcyanide, a/k/a phenylacetonitrile; procaine hydrochloride, USP
Factory: Groton, CT
Statement signed: April 28, 1987
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, July 14, 1987

(X) Company: Quality Egg and Egg Products Corp.
Articles: Frozen egg white and yolk; frozen whole eggs
Merchandise: Shell (whole) chicken eggs
Factory: Dayton, NJ
Statement signed: February 1, 1987
Basis of claim: Used in, with distribution to the products obtained, in accordance with their relative value at the time of separation
Rate issued by RC of Customs in accordance with § 191.25: New York, July 6, 1987
Revokes: T.D. 81–225–R to cover a change in name from Quality Egg and Egg Products Co., Inc.

(Y) Company: Sandoz Chemicals Corp.
Articles: Foron Blue S–BGl P/C; Foron Blue S–BGL 105% granules; Foron Blue S–BGL 200% granules
Merchandise: 1,5 dimethoxyanthraquinone (DIMAC)
Factory: Martin, SC
Statement signed: September 30, 1986
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, June 8, 1987

(Z) Company: Umetco Metals Corp.
Articles: Ferrovanadium; Nitrovan; Carvan
Merchandise: Modified vanadium oxide, vanadium pentoxide
Factory: Niagara Falls, NY
Statement signed: December 11, 1986
Basis of claim: Used in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): New York, December 18, 1986
Revokes: T.D. 85–106–R to cover successorship from Union Carbide Corp.

U.S. Customs Service

General Notices

APPLICATION FOR RECORDATION OF TRADE NAME: "J & J AMERICA, INC."

ACTION: Notice of application for recordation of trade name.

SUMMARY: Application has been filed pursuant to section 133.12, Customs Regulations (19 CFR 133.12), for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "J & J America, Inc.," used by J & J America, Inc., a corporation organized under the laws of the state of Florida, located at 11401 S.W. 40th Street, Miami, Florida 33165.

The application states that the trade name is used in connection with textiles, textile products, fabrics, ladies handbags, luggage, audio/visual equipment, televisions, video camera recorders, electronic accessories, sporting goods, women's fashion accessories, and costume jewelry, manufactured in Korea.

Before final action is taken on the application, consideration will be given to any relevant data, views, or argument submitted in writing by any person in opposition to the recordation of this trade name. Notice of the action taken on the application for recordation of this trade name will be published in the Federal Register.

DATE: Comments must be received on or before September 19, 1988.

ADDRESS: Written comments should be addressed to the Commissioner of Customs, Attention: Value, Special Programs and Admissibility Branch, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (Rm. 2104).

FOR FURTHER INFORMATION CONTACT: Betty Coombs, Value, Special Programs and Admissibility Branch, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202–566–5765).

Dated: July 13, 1988.

MARVIN M. AMERNICK,
Chief,
Value, Special Programs & Admissibility Branch.

[Published in the Federal Register, July 19, 1988, 1988 (53 FR 27258)]

19 CFR Part 177

TSUSA/HTSUS CROSS REFERENCE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of Use Limitations on TSUSA/HTSUS Cross Reference (USITC Publication 2051).

SUMMARY: The TSUSA/HTSUS Cross Reference Document is being improperly used by members of the international trade community as a substitute for the traditional tariff classification process. This notice informs interested persons that the use of the document provides only the probable classification of goods under the proposed Harmonized System and is not binding on the Customs Service.

EFFECTIVE DATE: July 20, 1988.

FOR FURTHER INFORMATION CONTACT: Hubbard L. Volenick, International Nomenclature Staff, Office of Regulations and Rulings, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202–566–8530).

NOTICE

In January 1988, the United States International Trade Commission (USITC) published a Report to the President under Section 332 of the Tariff Act of 1930, entitled "Continuity of Import and Export Trade Statistics After Implementation of the Harmonized Commodity Description and Coding System." The report, USITC publication 2051, was prepared in response to a request by the United States Trade Representative (USTR) in a effort to provide the international trade community with a means to bridge the current Tariff Schedules of the United States Annotated (TSUSA) and the proposed Harmonized Tariff Schedule of the United States (HTSUS). The proposed HTSUS is based on the Harmonized System, a nomenclature system developed by the Customs Cooperation Council for use in the classification of goods for customs tariff, statistical and transport documentation purposes. The draft legislation to implement the Harmonized System in the U.S. is presently pending before the Congress. The Customs Service is currently providing the public upon request with advisory Harmonized System classification rulings.

The TSUSA/HTSUS cross-reference are designed to assist the user in translating a known classification in the TSUSA into a likely classification under the HTSUS, *and should not be viewed as a substitute for the traditional tariff classification process.* The user is strongly cautioned against relying on the cross-references in order to determine appropriate tariff classifications under the proposed HTSUS. Such determinations can only be made by the U.S. Customs Service and depend upon the condition of an article as import-

ed, the applicable article provisions and rules of classification set out in the proposed HTSUS, and the body of customs practices and regulations relevant to the importation.

Dated: July 13, 1988.

MICHAEL H. LANE,
Acting Commissioner of Customs.

[Published in the Federal Register, July 20, 1988 (53 FR 27447)]

PUBLICATION OF CUSTOMS DECISIONS/RULINGS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of expanded rulings publication program.

SUMMARY: Customs announces an expanded program for publication of rulings and decisions in the CUSTOMS BULLETIN issued by the Customs Service Headquarters and rulings prepared by Customs National Import Specialists in New York. This notice informs interested persons of the scope of the program, detailing the substantive areas of Customs administrative law and practice included in the program.

FOR FURTHER INFORMATION CONTACT: U.S. Customs Service, Office of Regulations and Rulings, Legal Reference Staff, Room 2321, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202–566–6955).

SUPPLEMENTARY INFORMATION: The U.S. Customs Service (Customs) currently publishes selected administrative rulings in its weekly publication, the CUSTOMS BULLETIN. To better advise interested persons of Customs rulings under the Customs and navigation laws, Customs is expanding its publication program to provide additional information to the public about the existence of new rulings and to print the full text of many of those rulings. Therefore, in addition to those rulings having potential significant impact on the public to be published in full text, a much larger volume of rulings will be published in an abbreviated form.

Included in the categories of rulings to be published are the following administrative subjects: (1) Bonds; (2) Carriers; (3) Classification; (4) Drawback; (5) Entry or Liquidation; (6) Country of Origin Marking; (7) Quota and Voluntary Restraint Agreements (VRA's); (8) Restricted Merchandise; (9) Trademarks, Copyright and Patents, and (10) Valuation. Rulings from the U.S. Customs Service Headquarters and the New York Region will be published. Rulings issued by Headquarters cover all the substantive areas listed above. Rulings prepared by the Customs National Import Specialists in New York cover only the classification of merchandise under the

Tariff Schedules of the United States (TSUS) and the proposed Harmonized Tariff Schedule of the United States (HTSUS).

Due to the large volume of classification rulings and decisions, most of these will be published in abbreviated form and will identify the ISSUE or DESCRIPTION OF MERCHANDISE and HOLDING of the decisions, in addition to the ruling date and number. The appearance of these abbreviated classification rulings is intended for information purposes only and will not constitute a publication according to the provisions of Section 177.10 of the Customs Regulations (19 CFR 177.10).

Classification rulings of broad significance or precedential value will continue to be published as Customs Service Decisions (C.S.D.'s) in full text. This notice does not affect Customs continued practice of making rulings available to the public upon request according to the provisions of Part 103 of the Customs Regulations (19 CFR Part 103).

NOTICE

Effective upon publication in the CUSTOMS BULLETIN, the U.S. Customs Service will expand its program of publication of rulings and decisions which have potential significant impact on the public or which have precedential value. The expansion will cover ten substantive areas of Customs administrative law and practice and will result in more full text rulings and selected classification rulings of potential interest to the public will appear in the CUSTOMS BULLETIN in abbreviated form, for information purposes only. The appearance of these abbreviated rulings will not constitute a publication within the meaning of Section 177.10(b) of the Customs Regulations (19 CFR 177.10(b)).

Dated: July 15, 1988.

RICHARD R. ROSETTIE,
Deputy Assistant Commissioner,
Commercial Operations.

SYNOPSES OF ASSIST RULINGS

The following synopses of rulings issued during the July 1980–May 1988 period by the Office of Regulations and Rulings, United States Customs Service, Washington, D.C., interpreting and applying the provision on assists under section 402(h)(1)(A) of the Tariff Act of 1930, as amended by the Trade Agreements Act of interest to the trade community to merit publication in the following format.

The synopses are arranged by topic, and each shows the date of issue and the file number. These synopses are not necessarily exhaus-

tive of the matters decided by the rulings and should not be relied on as legal summaries.

Dated: July 20, 1988.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

MATERIALS

HRL 543971 EK, dated July 22, 1987

Copper concentrate is purchased by the importer from Zaire to be transported to a smelter/refinery in Zambia where it is converted into copper cathode. The sale is that between the Zambia smelter/refinery and the importer. Customs held that the value of the assist was represented by the sum of the price paid to the company in Zaire to purchase the copper concentrate and the transportation and related costs incurred in shipping the merchandise from Zaire to the site of the processing in Zambia.

HRL 543924 DH, dated May 29, 1987

Excess fabric not to be utilized as material incorporated into the merchandise to fill the original orders to be imported into the United States is not be be considered an assist under 402(h)(1)(A).

HRL 543838 CW, dated March 5, 1987

The transaction involved the sale of oil well tubing to the petitioner by the United States subsidiary of the Japanese manufacturer of the tubing. After its manufacture, the tubing was shipped from Japan to Canada where it was further processed by another company prior to its importation into the United States. Separate payments were made by the petitioner to the Japanese manufacturer's U.S. subsidiary for the tubing and the Canadian company for the further processing performed in Canada.

Transaction value is represented by the price actually paid or payable by the petitioner to the Canadian processor, plus the value, as an assist, of the tubing furnished without charge by the petitioner to the Canadian processor. The value of the assist equals the sum of the price paid by the importer to the Japanese manufacturer for the tubing and the transportation and related costs incurred in shipping the merchandise from Japan to the site of the further processing in Canada.

HRL 543623 CW, dated November 4, 1985

Plastic resin furnished free of charge to a foreign manufacturer by the importer of plastic products made from that resin are considered assists under section 402(h)(1)(A)(i) to the extent that the resin is not consumed in the production of the finished products. Resin which is consumed during the production process would be included under section 402(h)(1)(A)(iii).

HRL 543237, dated September 7, 1984

In this case, the United States importer trades in cocoa bean futures both for itself and the related Canadian company. If the actual costs for beans needed to produce the products purchased by the United States importer and the Canadian company exceed the estimated cost, the United States importer is responsible for paying the entire additional cost. In this connection, the Canadian company uses the intermediate chocolate products which it purchases from the related manufacturers in England and Ireland to produce finished products, some of which are then sold to the United States importer.

Customs believes that the United States importer is supplying, free of charge, a portion of the beans used in the preparation of the intermediate products which are then processed by the Canadian company into the finished products and sold to the United States importer. The additional charges paid by the United States importer for the cocoa beans used in the production of the finished products sold by the Canadian company to the United States importer are dutiable assists under the category for "materials, components, parts, and similar items incorporated in the imported merchandise" under section 402(h)(1)(A)(i) of the TAA.

TAA No. 55, HRL 542948, dated November 29, 1982

A custom integrated circuit ("chip") embodying engineering development fabricated in the United States, and provided to the seller/assembler is an assist within the provision pertaining to "materials, components, parts * * * incorporated in the imported merchandise."

Since the assist was acquired from an unrelated seller, the value of the assist is its cost of acquisition, which includes research and development cost incurred in producing the chip.

COMPONENTS

HRL 543405, dated June 21, 1985

Where components are sold by the importer to the foreign assembler at a price which does not include the cost of tooling used in the production of the components, the components are considered assists since they were provided at a reduced cost.

HRL 543093, dated April 30, 1984

Under the facts, integrated circuits and similar components are furnished free of charge by the importer to far East assemblers of video computer systems and related articles. Components which are destroyed, scrapped or lost during the assembly process and which are not physically incorporated into the imported articles are not assists.

TAA No. 20, HRL 542412 BLS, dated March 27, 1983

Components which are furnished free of charge or at a reduced cost to the Mexican assembler are included within the assist defini-

tion as "materials, components, parts, and similar items incorporated in the imported merchandise."

"* * * (ii) Tools, dies, mold, and similar items used in the production of the imported merchandise * * *."

The Statement of Administrative Action adopted by Congress in connection with the TAA and section 152.103(d)(2), Customs Regulations, provides that if the assist consists of tools, dies, molds, or similar items used in the production of the imported merchandise, acquired by the buyer from an unrelated seller, the value of the assist is its cost of acquisition. If the assist is produced by the buyer or a person related to the buyer, its value is the cost of its production. Profit is not a cost and should not be added to the value of the assist.

TOOLS

HRL 543595, dated April 17, 1986

Where the buyer of merchandise paid a manufacturer who was unrelated to the seller to produce tools for the seller to use in the production of the imported merchandise, the payments made to the manufacturer constituted an assist.

HRL 543556 CW, dated August 23, 1985

The importer paid the manufacturer to have a third party manufacture tools for Ford, which at all times retained title to and ownership of the tools. The foreign manufacturer then used the tools free of charge to manufacture the parts for the importer. Under these circumstances, the tools are considered "assists" and their costs can be amortized under generally accepted accounting principles.

HRL 543405 CW, dated June 21, 1985

Parts purchased by the importer from unrelated vendors in the United States, which are produced with the use of special tooling are then furnished without charge to the vendors. The transfer price between the importer and the Taiwan assembler does not reflect the special tooling costs. The parts are provided at a reduced cost and, therefore, they constitute assists. The value of the assists to be added to the price actually paid or payable equals the extent of the reduction in cost, which, in turn, production of the parts which are sent abroad for assembly.

HRL 543237 CW, dated September 7, 1984

Supplemental payments are made by the importer, to a related English company, in connection with the purchase of intermediate and finished chocolate and confectionery products.

The United States importer determines when the trades in cocoa bean futures should be made, and the related English manufacturer actually executes the importer's trade orders. The beans are delivered directly to the manufacturers and the full cost of the beans are

passed onto the importer when they are incorporated in the products which are exported to the United States. Customs concluded under these facts that, payments made by the importer for the increased bean costs are not assists, since the cocoa beans used in the production of the imported products can not be considered to be supplied "free of charge or at a reduced cost * * * by the buyer of imported merchandise * * *"

INDIRECT PAYMENT

C.S.D. 83–3, dated July 19, 1982

This case involved certain valves which an importer contemplated having manufactured abroad. The manufacturer would build special tools for this purpose and the importer would reimburse the manufacturer for the cost of manufacturing the tools. The tools do not come within the statutory definition of "assists" because they are not to be supplied by the buyer.

"Tooling is not an assist where tools paid for by the buyer are constructed by the manufacturer for use in producing merchandise for the buyer. The payment for the tools constitutes part of the price actually paid or payable for the merchandise (section 402(h)(1)(A), Tariff Act of 1930)."

"The additional amount which you would pay to the manufacturer for producing the tools would be dutiable because it constitutes part of the price actually paid or payable for the merchandise, *i.e.*, part of the total payment made by the buyer to, or for the benefit of, the seller and would be included in the transaction value of the merchandise to be imported."

HRL 543951 DH, dated September 23, 1987

Payment for tooling costs made by the buyer to the foreign manufacturer is an indirect payment under section 402(b)(4)(A) and therefore is a part of the "price actually paid or payable".

HRL 543924 DH, dated May 29, 1987

Payments made by the importer to the supplier for the losses incurred from the sale of excess fabric which resulted from the importer cancelling orders for merchandise are not part of the "price actually paid or payable" for the imported merchandise.

HRL 543882, dated March 13, 1987

Payments made by the ultimate United States purchaser, through the United States subsidiary/importer, to the foreign manufacturer/seller for use in the production of tooling necessary to produce the imported merchandise are indirect payments and part of the price actually paid or payable.

HRL 543574, dated March 24, 1986

Payments made by the ultimate United States purchaser, through the United States subsidiary/importer, to the foreign manufacturer/seller for use in the production of tooling necessary to

produce the imported merchandise are indirect payments and part of the price actually paid or payable.

HRL 543595, dated April 17, 1986

If the buyer of merchandise pays the seller/manufacturer to produce tooling necessary in the production of the imported merchandise, such payment is included in the price actually paid or payable as an indirect payment.

MOLDS

HRL 543983 DH, dated December 2, 1987

Monies advanced to a seller by the buyer for the purchase/manufacture of a mold necessary to produce lamp bases, fifty percent of the amount to be returned upon the completion of one half the pieces and the remainder to be remitted after completion of the full contract amount, do not constitute an assist but are part of the "price actually paid or payable".

HRL 543889 EK, dated May 12, 1987

Photomasks which are used in the transfer of integrated circuitry onto silicon wafers were held to be analogous to a mold and dutiable as an assist pursuant to section 402(h)(1)(A)(ii).

In determining the value of assists such as tools, dies, molds and similar items which are produced by the importer, the cost of production determines the value of the assist, as long as, there is no authority to exclude the United States engineering and development costs that have been incurred in producing the photomask. The value of the assist is its cost of production which includes the engineering and development costs incurred by the importer in producing the photomask.

HRL 542948, dated November 29, 1982

An importer paid a domestic third party a total sum for an integrated circuit chip. This amount consisted of engineering and development charges for the software and an additional amount for the material and fabrication. This office ruled that the total cost of acquisition to the importer was the sum of the two parts and the value of the assist.

TAA No. 33, HRL 542324 BLS, dated June 22, 1981

Photomasks provided by a buyer to a seller are assists, the value of which is the cost of acquisition, if purchased, or the cost of production, not including a profit factor, if produced.

TAA No. 21, HRL 542355 BLS, dated April 3, 1981

A metal stamper produced in the United States by the importer to be used in the production of phonograph records in Japan is analogous to a mold.

Section 52.103(d)(2) of the Customs Regulations provides that the value of an assist in the nature of a tool, die, mold, or similar item, is its cost of production if produced by the buyer (of the merchan-

dise) or a person related to the buyer. The cost of producing the assist included the cost of: musicians and arrangements, rehearsal pay, rehearsal hall rent, agency fee, studio cost, digital recorder, engineer, cartage, mastering, plating and producer.

EQUIPMENT

HRL 554993 EK, dated May 19, 1988

A fork lift truck, work tables and benches provided to an assembly plant are not assists within the meaning of section 402(h)(1)(A) of the TAA.

HRL 543631 DH, dated June 8, 1987

Equipment and machinery supplied by an unrelated third party are not considered assists, since they are not supplied directly or indirectly by the buyer of the imported merchandise.

TAA No. 18, HRL 542302 BS, dated February 27, 1981

Air conditioning equipment, power transformers, telephone switching equipment, emergency generators, and other equipment not used in the production of imported goods, do not fall within the definition of assists, as they are not used in the production of the merchandise. Accordingly, unless they are carried on the books of the foreign producer, their cost or value may not be apportioned to the merchandise, and they are not includable in transaction value or computed value. Sewing machines used in the production of imported goods are assists. Assists may be apportioned and depreciated as desired if in accordance with generally accepted accounting principles.

TAA No. 9, 542139 TLL, dated October 15, 1980

Sewing machines, ovens, drill presses, etc., were properly added to computed value as "assists" under section 402(h)(1)(A) when furnished free of charge or at a reduced cost by the buyer for use in connection with the production of merchandise imported into the United States.

TAA No. 4, 542122 TLL, dated September 4, 1980

General purpose equipment, such as sewing machines, ovens, drill presses, etc., furnished free of charge or at a reduced cost used abroad in the production of merchandise imported into the United States are dutiable under secion 402(h)(1)(A)(ii).

"* * * (iv) Engineering, development, artwork, design work, and plans and sketches that are undertaken outside of the United States and are necessary for the production of the merchandise * * *."

HRL 543889 EK, dated May 12, 1987

Photomasks were held to be valued pursuant to the Statement of Administrative Action. Customs held that the value of the assist was not the cost of acquiring it since the assist was not acquired by the importer from an unrelated seller but the cost of production

since the photomask was produced by the importer (or person related to him) and then supplied to the foreign seller.

HRL 543806 EK, dated March 12, 1987

Under the provided facts the seller was provided with the details of the process patent (which was owned by the buyer) and specific manufacturing techniques for the chemicals, free of charge, by the buyer.

The cost of development was to be added to the price actually paid or payable where all research and development for a process patent were performed outside the United States by employees of the buyer. Research costs were not includable as assists under section 402(h)(1)(A)(iv). This section includes "Engineering, development, artwork, design work, * * * that are undertaken elsewhere than in the United States and are necessary for the production of the imported merchandise" as dutiable assists.

In the situation where all research and development were performed for the United States corporation, buyer, in the United States, the research and development was held not to be considered an assist.

TAA No. 15, HRL 542220 MK, dated December 24, 1983

A prototype sample developed entirely in the United States, to be used as a pattern or a template will not be treated as a dutiable assist under section 402(h)(1)(A).

TAA No. 55, HRL 542948, dated November 29, 1982

A Custom integrated circuit chip is an assist within the meaning of secion 402(h)(1)(A)(i). The value of the assist is its full cost of acquisition from the designer/fabricator of the chip (a U.S. company unrelated to the importer), which includes research and development costs incurred in producing the chip.

TAA No. 54, HRL 542936, dated November 12, 1982

A metal disc known as a "mother" is used in the production of phonograph records. The importer furnishes free of charge to an unrelated third party in the United States a "master lacquer" which is used in the production of the "mother". The "mother" is then sold to the importer, who furnishes it without charge to the foreign manufacturer to produce the stamper.

We concluded that, a "mother" or other intermediate step in the manufacturing process, such as the "working film" or photographic negative", while necessary for production of the imported merchandise, does not give final shape or form to the finished product, as a mold would, but merely is used to produce a mold or to produce another item which in turn may be used to produce a mold. Such an item is in the nature of development work, and since performed in the United States, is not an assist.

TAA No. 37, HRL 542446 BLS, dated July 23, 1981

Magnetic reel tapes produced in the United States and furnished to the Japanese manufacturer for use in the production of phonograph discs were held to be in the nature of design work or product development necessary for the production of the imported merchandise, within the meaning of section 402(h)(1)(A)(iv), and are not dutiable assists.

TAA No. 33, HRL 542324 BLS, dated June 22, 1981

Pattern generator tapes that contain instructions meaningful to a pattern generator machine for the purpose of laying-out and printing the desired circuit pattern onto a photomask which was produced in the United States and furnished free of charge by the importer to several foreign manufacturers was fount to be in the nature of design work, rather than tooling, primarily because the tape itself is a drawing. The tapes were held not to be assists since the work involved was performed within the United States and section 402(h)(1)(A)(iv) of the TAA was inapplicable.

Engineering and development performed within the United States is not an assist. Engineering and development performed outside the United States, which is an assist, may be valued according to an estimate based on a percentage type formula.

TAA No. 32, HRL 542377 MK, dated June 16, 1981

A U.S. company provides various types of technical assistance to a foreign subcontractor who constructs two subassemblies, and to other subcontractors who furnish components directly to the subcontractor of the subassemblies. These subassemblies are imported and incorporated into the U.S. company's communications satellites.

Assistance based on foreign-produced prototypes, which are entered into the United States under a temporary importation bond are not considered to be an "assist" since the assistance was provided in the United States.

A model which is built in the United States and is exported to a foreign subcontractor who uses the model to build a comparable unit, which is exported to the U.S. is not an assist since the model "originated" in the United States. The model is not dutiable under a computed value appraisement because it is not incorporated into the imported article, and, unlike a mold, is not used in producing the imported article.

TAA No. 13, HRL 542152 BS, dated December 4, 1980

1. The importer gave a cash advance for a drawing, together with a crude working model conceived and fabricated in the United States. The design and working model was given free of charge to a subsidiary of the importer in Hong Kong. The subsidiary then used the design drawing and working model to fabricate the imported product.

Customs held that the drawing and working model were necessary for the production of the merchandise, and were the type of items enumerated in section 402(b)(1)(B)(iv). However, since the work done to produce these items was undertaken in the United States, the items did not fall within the definition of an "assist."

2. In the case where the invention and working model were conceived and fabricated in Canada the cost of developing the invention and working model were considered to be dutiable assists since they were the type of items enumerated in the statute, and the design work and the fabrication of the model were undertaken outside of the United States.

Since the assist was acquired by the importer from an unrelated seller, the value of the assist was the cost of acquisition. This cost included the royalty payments as well as the cash advance. The patent holder sold the technical knowledge transferred by the patent right, and embodied in the form of the designs and model.

3. In the case where the invention and working model were designed and fabricated in Canada, and a lump sum was given to the patent holder in the United States based on sales in this country, the Canadian drawing and working model and royalty payments to the United States were considered assists, the royalty payments being part of the cost of the drawing and model.

TAA No. 23, HRL 542325 TLL, dated April 3, 1981

Design department costs incurred in the United States are not assists under either transaction or computed value. Design department costs, not carried on the producer's books as either a cost or value of materials and of fabrication, or as a general expense, if in accordance with generally accepted accounting principles, are not part of computed value.

ACQUISITION COSTS

HRL 554993, dated May 19, 1988

The value of an assist is to include the transportation costs to the place of production.

HRL 543872 CW, dated March 5, 1987

Transaction value would be represented by the price actually paid or payable by the buyer (importer) to the company in the third country which incorporated the additional parts in the merchandise, plus the value, as an assist, of the merchandise furnished without charge by the importer to the company in the third country. The value of this assist would equal the sum of the price paid by the importer to the Japanese manufacturer of the merchandise, and the transportation and related costs incurred in shipping the merchandise from Japan to the site of the further processing in the third country.

TAA No. 58, HRL 543003, dated February 25, 1983

The importer sold the material to the assembler at a price equaling the importer's standard cost. The standard cost in this instant has been used as a transfer price, which was prepared in accordance with generally accepted accounting principles.

Pursuant to the statutory definition, assists are certain enumerated items if supplied "free of charge or at reduced cost."

We concluded that " * * * the material is not an assist, and freight related charges incurred in transporting the material to the assembler are not dutiable under transaction value." [Reversed by TAA No. 63].

TAA No. 63, HRL 543096, dated June 21, 1983

Material was sold to the assembler at a standard cost price based upon representative purchase prices. The freight and related transportation costs which were associated with the shipment of material to the assembler was paid by the importer.

Under the Statement of Administrative Action, and section 152.103 of the Customs Regulations, the value of an assist includes transportation costs to the place of production. The cost of freight and related transportation charges when paid by a seller are normally charged by him to the buyer as part of the overall price of the merchandise. In this case, since the buyer (exporter) did not pay those charges, he received the material "at a reduced cost," within the definition of assists in section 402(h)(1)(A). Accordingly, an assist was furnished to the extent that the cost was reduced, that is, in the amount of the actual cost of freight and related transportation charges.

TAA No. 20, HRL 542412 BLS, dated March 27, 1983

"Procurement assists" include purchasing, receiving inspection, warehousing, and transporting component parts from the plant in the United States to the Mexican facility.

In determining the value of an assist, there must be added (1) the cost of acquiring the assist, if acquired by the importer from an unrelated seller; and (2) the cost of transporting the assist to the place of production, including the cost of freight and insurance.

In this case the cost of acquiring an assist is limited to the purchase price, if purchased from an unrelated party. Therefore, the cost of procuring the assist is not to be included in its value. Neither are the receiving inspection and warehousing costs. Actual transportation costs are a part of the value of the assist.

TAA No. 16, 542144 BLS, dated February 4, 1981

In determining the value of an assist, there must be added (1) the cost of acquiring the assist, if acquired by the importer from an unrelated seller; and (2) the cost of transporting the assist to the place of production, including the cost of freight and insurance. The cost of procuring an assist, receiving inspection and warehouse costs are not a part of the value of an assist.

MANAGEMENT SERVICES

HRL 543992 EK, dated September 10, 1987

The importer purchased apparel from its related party company in Columbia. Two United States employees were sent to Columbia to act as a financial officer and a general manager of the related company. Both received their salaries from the importer. Customs concluded that these types of services were not assists within the definition of 402(h)(1)(A) of the TAA.

HRL 543631 DH, dated June 8, 1987

Where the importer assigns a U.S. resident to the assembly plant of the exporter, the salary costs, which are paid in part by the government and in part by the importer, are non-dutiable. The portion of the management services paid by the importer is not added to the "price actually paid or payable". The portion paid by the government is not considered an assist, since it is not directly or indirectly, supplied by the importer.

HRL 543877, dated March 17, 1987

In the case where the importer provided the exporter with two cutters, a finishing supervisor and five sewing supervisors to be domiciled in Hong Kong in order to train the personnel to assume production-related tasks, the services of these employees were not within the scope of section 402(h)(1)(A)(iv) as "engineering, development * * *" costs.

The importer provided a manager to the exporter to be domiciled in Hong Kong. Customs held that management services of this type did not constitute assists pursuant to section 402(h)(1)(A).

The services performed by a mechanic provided by the importer was held not to be within the scope of any portion of 402(h) of the TAA, and will not be treated as a dutiable assist.

HRL 543820, dated December 22, 1986

Management services were provided by the buyer of imported merchandise to the seller for use in the production of the merchandise. The living quarters were provided by the importer. Under these facts, Customs held that the management services were not assists, as defined in section 402(h)(1)(A) of the TAA.

HRL 543576 CW, dated March 3, 1986

Salary costs are reflected as expenses in the accounts maintained for the assembler by the importer, but not on the importer's own expense accounts. The issue of whether the portion of the salary costs paid directly to the involved employees through the importer's bank account constitutes a dutiable assist does not arise inasmuch as these expenses are already considered dutiable as part of the "amount for profit and general expenses" under computed value or as part of the "price actually paid or payable for the merchandise" under transaction value.

TAA No. 20, HRL 542412 BLS, dated March 27, 1983

Customs held that the services of United States residents which worked at a Mexican plant; received their salaries from the United States employer; and held the positions of General Manager, Production Manager, Quality Control Manager, Production Foreman, Production Engineer, Engineer Manager, and New Production Design Engineer, would not be added as assists under transaction value.

Further, these services would not be added as an assist cost to the price actually paid or payable since they fall within the provision which prevents the addition of these services as an assist if the service or work was (1) performed by a person domiciled within the United States; (2) performed while that person was acting as an employee or agent of the buyer of the imported merchandise; and (3) was incidental to other engineering, development, art work, design work, or plans and sketches undertaken within the United States.

TAA No. 46, HRL 542696 BLS, dated February 22, 1982

Salaries paid by the U.S. importer, through the Mexican assembler, to U.S. resident employees working in the Mexican assembly plant in the capacity of plant manager, plant engineer, production foreman, and quality control personnel are not to be treated as assists. Therefore, their value was not to be added to the transaction value.

TAA No. 33, HRL 542324 BLS, dated June 22, 1981

Costs of the technical advisors' trips made to the manufacturer, including travel and appropriate amounts for salaries of personnel involved are not assists.

Interim technical analysis performed by an individual who is domiciled in the United States and acting as an agent of the buyer of the imported merchandise is not an assist.

Reimbursements by a buyer to a manufacturer for the cost of the manufacturer's engineers to come to the United States to learn the operation of test equipment is an assist, and is to be valued according to the amount of the reimbursement.

TAA No. 32, HRL 542377 MK, dated June 16, 1981

A U.S. company provides various types of technical assistance to a foreign subcontractor who constructs two subassemblies, and to other subcontractors who furnish components directly to the subcontractor of the subassemblies. These subassemblies are imported and incorporated into the U.S. company's communications satellites.

Services of engineers and manufacturing specialists employed by the U.S. company; who are domiciled in the United States; and who travel to the foreign contractors to assist them are nondutiable because they do not fall within the definition of assists.

Labor incidental to the professional engineering assistance provided by the employees described above, is not dutiable.

Assistance based on foreign-produced prototypes, which are entered into the United States under a temporary importation bond are not considered to be an "assist" since the assistance was provided in the United States.

TAA No. 16, HRL 542144 BLS, dated February 4, 1981

Salaries paid by the United States corporation to personnel working abroad who are domiciled in the United States are dutiable only to the extent that their work involves assist activity. The cost of acquiring an assist is limited to its purchase price plus actual transportation costs. The costs of procuring an assist, receiving inspection, warehousing, and transporting component parts are not a part of the value of an assist.

TAA No. 4, HRL 542122 TLL, dated September 4, 1980

We held that management services, accounting services, legal services, and other services related to imported merchandise rendered abroad or in the United States by persons paid by their U.S. employers, would not be added to the price actually paid or payable in order to determine transaction value for the imported merchandise. However, if the price actually paid or payable includes a charge for these items, no authority exists in section 402(b)(3), or elsewhere, to remove them from the price actually paid or payable.

Customs does not have the intention of burdening importers with the requirement of submitting unnecessary cost information by the continuous reporting of information previously reported. This is distinguished from those situations in which Customs has a legitimate interest in learning the duty consequences of the particular transaction under scrutiny.

PLANT RENTAL COSTS

Plant rental provided free of charge by the foreign government is not considered an assist, since it was not supplied directly or indirectly by the buyer.

APPORTIONMENT

Section 152.103(e)(1) of the Customs Regulations, 19 CFR 152.103(e)(1)

This section allows for the apportionment of the value of assists to imported merchandise to be made in a reasonable manner appropriate to the circumstances and in accordance with generally accepted accounting principles.

"The method of apportionment actually accepted by Customs will depend upon the documentation submitted by the importer." Consistent with the above is that portion of the Statement of Administrative Action which emphasizes that the importer must substantiate his requested method of apportionment. Accordingly, as provided for in 19 CFR 152.103(e)(1) while an importer may propose a method of apportioning the value of an assist, it is the responsibility of the Customs Service to accept a method of apportionment.

STATEMENT OF ADMINISTRATIVE ACTION

> Once a value has been determined for the assists * * * it is necessary to apportion that value to the imported merchandise. The apportionment of these elements will be made in a reasonable manner appropriate to the circumstances and in accordance with generally accepted accounting principles. The method of apportionment used will depend on the details in the documentation by the importer to substantiate his requested method * * * If the anticipated production using the assist is only partially destined for the United States, or if the assist is used in several countries, the method of apportionment to be used will depend upon the documentation provided by the importer to substantiate the requested method * * *

TAA No. 35, HRL 542519 TLL, dated ——

Headquarters ruled that with respect to merchandise which is subject to duty-free entry, no authority exists to apportion the value of an assist on the first duty-free entry. In that case, the circumstances were such that it was a common occurrence for an article to be entered free of duty on one entry, and dutiable on a subsequent entry.

HRL 544194 EK, dated May 23, 1988

Apportioning the value of an assist on the first entry and subsequently claiming drawback on that entry is not in accordance with generally accepted accounting principles and not authorized by the TAA.

HRL 543875 CW, dated December 4, 1987

Customs held that the subject design assists should properly have been determined in accordance with T.D. 78–339. T.D. 78–339 directed that at the time of the first importation of an article produced with the use of a design assist, the full amount of the design firm's fee shall be prorated among that design and all other designs created in that period and used in either a domestic or foreign production run, or for which there is a current contract for production.

HRL 543806, dated March 12, 1987

Under the facts of this case regarding a patent, a proportionate share of the development cost added to the invoice price of each shipment of merchandise until the entire development cost had been amortized was a reasonable method of apportioning the cost of development. The amount that was added to each entry was to be based upon the number of units expected to be produced for sale to the United States according to available forecasts. This method of apportionment was held to be reasonable in light of the circumstances and in accordance with generally accepted accounting principles.

HRL 543278 CW, dated October 31, 1984

Where a mold is purchased in the United States by the importer and provided free of charge to an unrelated foreign manufacturer for use in producing toys to be imported into the United States the importer is to pay duty on the total value of the mold at the time of the manufacturer's initial shipment. The mold is then to be sent free of charge by the importer to a second unrelated manufacturer in the same or different foreign country to produce toys to send to the importer.

Duty may be paid on the full value of the mold on importation of the initial shipment, and no additional duty would be due on the value of the mold with respect to subsequent shipments of merchandise produced with the use of the assist by a second manufacturer regardless of the fact that the second manufacturer is in a different country.

TAA No. 33, HRL 54324 BLS, dated June 22, 1981

Process charges paid by the importer may be apportioned on the initial shipment of the goods.

ACCOUNTING METHODS

SECTION 10.19 of the CUSTOMS REGULATIONS

This section describes the proper allocation between costs of fabrication and general expenses.

TAA No. 4, HRL 542122 TLL, dated September 4, 1980

Under Section 10.19 of the Customs Regulations Customs will no longer possess the authority to reject information submitted on the basis of the accounting method by which that information was prepared. Therefore, it is Customs position that section 10.19 is not relevant to those appraisements made under the Trade Agreements Act of 1979.

Customs does not intend to burden the importers with the requirement of submitting unnecessary cost information by the continuous reporting of information previously reported. This is to be distinquished from those situations in which Customs has a legitimate interest in learning the duty consequences of the particular transaction under scrutiny.

TAA No. 23, HRL 542325 TLL, dated April 3, 1981

The first sentence of section 402(g)(3) of the TAA acts as a bar on Customs telling an importer, buyer, or producer how to keep its books. This is, in our opinion, in accordance with the legislative history of the TAA. See for example, page 86 of the House of Representatives Report of the Committee on Ways and Means to Accompany H.R. 4537, wherein it is stated * * *

> the intent is to allow the importer, buyer or producer to prepare his figures in any one of a variety of acceptable methods, and Customs will not reject the manner in which such informa-

tion is organized, so long as the preparation and methods are in accordance with generally accepted accounting principles.

COMPUTED VALUE

TAA No. 9, HRL 542139 TLL, dated October 15, 1980

The generally accepted accounting principles of the country of production or exportation is to be taken into account in determining the computed value. This would require a case-by-case analysis. Those items which were formerly treated as dutiable assists under 402(h)(1)(A), will not be considered as part of computed value, as long as such treatment is in accordance with the relevant generally accepted accounting principles.

TAA No. 32, HRL 542377 MK, dated June 16, 1981

A U.S. company provides various types of technical assistance to a foreign subcontractor who constructs two subassemblies, and to other subcontractors who furnish components directly to the subcontractor of the subassemblies. These subassemblies are imported and incorporated into the U.S. company's communications satellites.

A model which is built in the United States and is exported to a foreign subcontractor who uses the model to build a comparable unit, which is exported to the U.S. is not an assist since the model "originated" in the United States. The model is not dutiable under a computed value appraisement because it is not incorporated into the imported article, and, unlike a mold, is not used in producing the imported article.

HRL 543502 CW, dated June 11, 1985

The following costs are not includable as assists in computed value under section 402(e)(C) of the TAA.

1. Traveling expenses from the Mexican plant to the home office in the United States incurred by a United States domiciled plant manager working in the assembly plant in Mexico and employed by a United States parent company (importer).
2. Entertainment expenses incurred by the plant manager in the United States and Mexico.
3. Expenses incurred in transporting an engineer employed by the assembler to the home office in the United States for training.
4. Membership fees and dues paid to a United States association to which the plant manager belongs.

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 85–2776)

TEXAS INSTRUMENTS, INC., APPELLANT *v.* U.S. INTERNATIONAL TRADE COMMISSION, APPELLEE

James F. Davis, Howrey and Simon, of Washington, D.C., argued for appellant. With him on the brief was *Kenneth E. Krosin*. Also on the brief were *Melvin Sharp*, *Richard L. Donaldson* and *David V. Carlson*, Texas Instruments, Inc., of Dallas, Texas.

Wayne W. Herrington, Office of the General Counsel, of U.S. International Trade Commission, of Washington, D.C., argued for appellee. With him on the brief were *Lyn N. Schlitt*, General Counsel and *Michael P. Mabile*, Assistant General Counsel.

William L. LaFuze, of Houston, Texas, was on the brief for Amicus Curiae, American Intellectual Property Law Association. *Robert C. Kline*, of Arlington, Virginia, of counsel.

Appealed from: U.S. International Trade Commission.

ORDER

A suggestion for rehearing in banc of the panel order dated May 16, 1988, a response by the appellee, a motion of the American Intellectual Property Law Association for leave to file a brief as amicus curiae, and a response to the motion, having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the brief amicus curiae be filed; and it is

FURTHER ORDERED that the suggestion for rehearing in banc is declined.

Judges Nies, Bissell, and Archer would rehear the case in banc.

FOR THE COURT,
FRANCIS X. GINDHART,
Clerk.

Dated: July 6, 1988.

NIES, *Circuit Judge,* dissenting from the denial of rehearing in banc.

Appellant and the amicus curiae in this case have expressed concern that the decisions which have been issued by the *Texas Instruments* panel alter the legal standard for determining infringement of a patent claim adopted by this court, in banc, in *Pennwalt Corp.* v. *Durand-Wayland, Inc.,* 833 F.2d 931, 4 USPQ2d 1737 (Fed. Cir. 1987), *cert. denied,* 108 S. Ct. 1226, 1474 (1988).

It is now settled law that each element of a claim is material and essential and, in order to find infringement, the patent owner must show the presence of every element or its substantial equivalent in the accused device. *Pennwalt Corp.,* 833 F.2d at 935, 4 USPQ2d at 1739–40. The *Pennwalt* court rejected the view of a minority of the court that only literal infringement required an element-by-element analysis and that infringement under the doctrine of equivalents could be found under an "invention as a whole" standard, even though an element of the claim was not present, at least by an equivalent, in the accused device or process. That debate has been ended.

The concerns expressed in the briefs here, I believe, are unwarranted under our precedent. A panel decision cannot overturn *any* precedential ruling of the court, even of a prior panel, much less that of an in banc court. *See, e.g., Capitol Elec., Inc.* v. *United States,* 729 F.2d 743, 746 (Fed. Cir. 1984) (only court sitting in banc can overrule an earlier panel decision). The *Texas Instruments* panel overruled nothing in *Pennwalt* and does not purport to do so. I support in banc, however, to clarify that, to the extent the original *Texas Instruments* opinion appeared to adopt a different standard on infringement from that adopted in *Pennwalt,* it cannot be so interpreted.

As subsequently explained in the order denying rehearing in *Texas Instruments,* the majority found no equivalency, either under 35 U.S.C. § 112 ¶6 or under the doctrine of equivalents, between components of the accused devices and elements required by the claim. Thus, under the standard adopted in *Pennwalt,* infringement was not established. With respect to whether that finding of no equivalence was correct, I express no opinion. I would add, however, that this court has not, in its case law, set out general guidelines with respect to what constitutes an equivalent element either where section 112 para. 6 is involved or where it is not. It appears to be the intent of the *Texas Instruments* opinion to provide such guidance where numerous changes have been made from the disclosed embodiment of the invention and the elements of the claim are expressed in means-plus-function language.

In *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.,* 339 U.S. 605 (1950), the Supreme Court gave only these guidelines on determining equivalency of a substituted ingredient or component to one specified in a claim:

> In its early development, the doctrine [of equivalents] was usually applied in cases involving devices where there was equivalence in mechanical components. Subsequently, however, the same principles were also applied to compositions, where there was equivalence between chemical ingredients. Today the doctrine is applied to mechanical or chemical equivalents in compositions or devices. See discussions and cases collected in 3 Walker on Patents (Deller's ed. 1937) §§ 489–492; Ellis, Patent Claims (1949) §§ 59–60.
>
> What constitutes equivalency must be determined against the context of the patent, the prior art, and the particular circumstances of the case. Equivalence, in the patent law, is not the prisoner of a formula and is not an absolute to be considered in a vacuum. It does not require complete identity for every purpose and in every respect. In determining equivalents, things equal to the same thing may not be equal to each other and, by the same token, things for most purposes different may sometimes be equivalents. Consideration must be given to the purpose for which an ingredient is used in a patent, the qualities it has when combined with the other ingredients, and the function which it is intended to perform. An important factor is whether persons reasonably skilled in the art would have known of the interchangeability of an ingredient not contained in the patent with one that was.

Id. at 609.

Thus, in banc would also give the court the opportunity to amplify the standard for determining equivalency between components in an accused device and required elements of a claim.

(Appeal No. 87–1455 and 87–1616)

ALLIED CORP., APPELLANT *v.* U.S. INTERNATIONAL TRADE COMMISSION, APPELLEE, AND HITACHI METALS, LTD., ET AL., VACUUMSCHMELZE GMBH, NIPPON STEEL CORP., ET AL., AND SIEMENS CAPITAL CORP., INTERVENORS/APPELLEES

David W. Plant, Fish & Neave, of New York, New York, argued for appellant Allied. With him on the brief were *David J. Lee*, *Eric M. Lee*, *Christopher B. Garvey* and *Robert A. Musicant*. Also on the brief were *Brian D. Forrow* and *David M. McConoughey*, Allied Corporation, of Morristown, New Jersey, of counsel.

Jean H. Jackson, Office of the General Counsel, U.S. International Trade Commission, of Washington, D.C., argued for appellee ITC. With her on the brief were *Lyn M. Schlitt*, General Counsel and *James A. Toupin*, Assistant General Counsel.

Thomas J. Macpeak, Sughrue, Mion, Zinn, Macpeak & Seas, of Washington, D.C., argued for intervenor Hitachi. With him on the brief were *Waddell A. Biggart* and *Sheldon I. Landsman*. Also on the brief were *Alan J. Neuwirth*, *Michael Doherty* and *Richard Mescon*, Webster & Sheffield, of New York, New York, of counsel.

John D. Simpson, Hill, Van Santen, Steadman & Simpson, of Chicago, Illinois, argued for intervenor Vacuumschmelze. With him on the brief was *Steven H. Noll*. Also on the brief was *Tom Schaumberg* and *Alice Kipel*, Howrey & Simon, of Washington, D.C, of counsel.

Thomas L. Creel, Kenyon & Kenyon, of New York, New York, argued for intervenor Nippon. With him on the brief were *Edward W. Greason, Robert T. Tobin, Philip J. McCabe, John J. Kelly, Jr.* and *Richard M. Rosati.*

Appealed from: U.S. International Trade Commission.

(Decided June 29, 1988)

Before MARKEY, *Chief Judge,* DAVIS* AND ARCHER, *Circuit Judges.*

MARKEY, *Chief Judge.*

Consolidated appeals from an Advisory Opinion of the United States International Trade Commission (ITC), Investigation No. 337-TA-143 (May 28, 1987) (Appeal No. 87-1455), and from a Modified General Exclusion Order, *Id.* (June 17, 1987) (Appeal No. 87-1616). We dismiss the appeal from ITC's Advisory Opinion for lack of jurisdiction and affirm the Modified General Exclusion Order.[1]

BACKGROUND

These appeals arise out of further developments in the 1983-84 ITC Investigation No. 337-TA-143, *In the Matter of Certain Amorphous Metals and Amorphous Metal Articles. See* USITC Publication 1664 (Nov. 1984); 49 Fed. Reg. 42803 (October 24, 1984).

A. THE 1983-84 INVESTIGATION

On March 11, 1983, ITC commenced Section 337 proceedings (19 U.S.C. § 1337 (1982 & Supp. 1984)) against several importers of steel products, including parties to this action Hitachi Metals Ltd. (HML), Nippon Steel Corporation (NSC), Vacuumschmelze GmbH (VAC) and Siemens Capital Corp. (Siemens). In part, ITC investigated whether the processes used to make the imported products would infringe Allied Corporation's (Allied's) U.S. Patent No. 4,271,257 (the '257 patent) on a "method of forming continuous strip of amorphous metal" if such processes were carried out in the United States. ITC referred the investigation to an administrative law judge (ALJ) to conduct an evidentiary hearing and to issue an initial determination (ID).

The ID issued May 14, 1984. The ALJ construed the claims and determined that all respondents except HML had violated § 337 and § 337(a) by importing amorphous metal articles made by processes which would infringe the '257 patent if such processes were practiced in the United States.

Before the ALJ, respondents argued that the '257 claims were "fatally indefinite and ambiguous" (35 U.S.C. § 112) and that the invention recited in those claims would have been obvious in light of the prior art (35 U.S.C. § 103). Both arguments were rejected, how-

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* Circuit Judge Davis, who died on June 19, 1988, took no part in the decision of this case.

[1] Related cross-appeals (87-1493 & 87-1642) by Nippon Steel Corp. and Nippon Steel U.S.A., Inc. were dismissed by unpublished Order June 16, 1988.

ever, because the ALJ interpreted the word "nozzle" as including the feature of wide lips.

> It is found that the word 'nozzle' as used in the '257 patent claims is ambiguous as to the structure of the nozzle, and that the specification can be used to construe this word. The '257 claims are construed as including the critical feature of the wide lips on the nozzle.

Inv. No. 337–TA–143, Initial Determination 44 (May 14, 1984) [hereinafter 1984 ID]

The ALJ left no doubt as to her interpretation of the scope of the '257 patent's claims:

> If the claims of the '257 patent are valid, it is only because the critical limitation relating to the width of the lips was read into the claims. If a respondent used a nozzle without wide lips, infringement could not be found.

Id. at 64.

Respondents and Allied petitioned the Commission for review. Respondents contended that the ALJ erroneously "preserved" the validity of the '257 patent by "reading in the limitation concerning wide lips." In response, Allied took the position that no review of the ALJ's claim construction and validity holdings was necessary.

> The ALJ found the word "nozzle" to be ambiguous and used the patent specification to *construe* this word to include "wide lips." The fault is not with the decision of the ALJ, but with the obvious mischaracterization of that holding by Respondents. No review of this issue is necessary. (Emphasis in original)

Allied went so far as to urge that the ALJ *correctly* construed "nozzle" to include the wide lips limitation.

> [T]he ALJ has correctly found that "[t]he '257 claims are construed as including the critical feature of the wide lips on the nozzle." The ALJ did not read Dr. Narasimhan's melt constraint or support theory into the '257 process claims.

In its petition for review, and in its response to respondents' petition for review, Allied argued that "the holding by the ALJ concerning the validity of the '257 claims when read *literally* is in error." At no point did Allied contend that the claim construction pertaining to "wide lips" was error.

ITC declined to review the ID, making it final. 19 C.F.R. § 210.53(h) (1988).[2] On Autust 1, 1985, ITC issued this Amorphous Metal Exclusion Order:

> Amorphous Metal articles manufactured abroad in accordance with the process set forth in claims 1, 2, 3, 5, 8, and/or 12 of U.S. Letters Patent 4,221,257 are excluded from entry into the United States for the remaining term of said patent * * *.

[2] Allied did appeal from that final decision. *Allied Corp. v. United States Int'l Trade Comm'n*, 782 F.2d 993, 228 USPQ 1532 (Fed. Cir. 1986). That appeal concerned two other patents, however, and did not relate to any issues involved here. Allied's appeal was dismissed as untimely. *Id.* at 994, 228 USPQ at 1533.

B. The 1985–87 Proceedings

In early 1985 ITC granted petitions for advisory opinion proceedings filed by HML and VAC who sought advice that the important of amorphous metal products made by their "newly developed" processes would not violate the Amorphous Metal Exclusion Order or section 337. *See* 19 C.F.R. § 211.54(b) (1988). ITC *sua sponte* initiated exclusion order modification proceedings, *see* 19 U.S.C. § 337(h); 19 C.F.R. § 211.57, with HML, VAC, NSC and Siemens as parties. The advisory opinion and exclusion order modification proceedings were consolidated for hearing.

On March 3, 1986, the ALJ issued an initial advisory opinion (IAO) and recommended determination (RD) on modification of the exclusion order. In the IAO and RD, the ALJ determined that the "new" HML and VAC processes did not infringe the '257 patent claims as interpreted by ITC in the original investigation, and recommended modification, accordingly, of the exclusion order. Allied petitioned ITC to review the ALJ's IAO and RD.

1. Advisory Opinion

On May 28, 1987, ITC issued its advisory opinion, which supplemented and modified the ALJ's IAO, but did not change its result. In particular, ITC stated:

> We reject Allied's arguments for redetermining the scope and validity of the '257 patent claims. Under the doctrine of law of the case * * * that decision should continue to govern the same issues in subsequent stages in the same case.
>
> * * * * * * *
>
> Apart from the application of law of the case to these proceedings, we note that Allied agreed not to litigate the issue of claim interpretation in the advisory opinion proceedings. Indeed, at the end of the original investigation, Allied embraced the claim interpretation necessary to preserve the '257 patent's validity in the original investigation.

Investigation No. 337–TA–143, Advisory Opinion Proceeding, Views of the Commission at 11–12 (May 28, 1987) (footnotes omitted).

Citing the earlier claim construction of "nozzle" to include a "wide lips" limitation as recited in the specification, ITC "construe[d] the wide nozzle lips to be of the dimensions set forth in the 'Summary of the Invention' set forth in the '257 patent specification." *Id.* at 15.[3] ITC concluded that: "in order for respondents' processes to literally infringe the claims of the '257 patent, they must utilize a front casting nozzle lip that is at least 1.45 times as wide as the width of the casting nozzle's slot." *Id.* at 15–16.[4] ITC expressly refrained from determining the upper range of nozzle lips

[3] The '257 specification provides that the "slot must have a width * * * of from about 0.3 to about 1 millimeter" and that "[t]he first [nozzle] lip must have a width at least equal to the width of the slot, and the second [nozzle] lip must have a width of from about 1.5 to about 3 times the width of the slot." *See id.* at 15.

[4] Based on expert testimony, ITC construed the word "about" in the claims "to allow a variance of up to .05 at the lower end of the front nozzle lip ratio range." *Id.* at 15 n.45.

that would fall within the scope of the claims. *Id.* at 15. ITC also found that there was no infringement under the doctrine of equivalents.

2. Modified Order

On June 17, 1987, ITC issued an order modifying its Amorphous Metal Exclusion Order of August 1, 1985. In the Modified Order, paragraph 1 repeated the claim construction set out in the advisory opinion, and paragraphs 3 and 4 set out procedures to be followed by those desiring to import articles "covered" by the order:

> 3. Persons desiring to import amorphous metal articles covered by paragraph 1 of this Order may petition the Commission to institute such further proceedings as may be appropriate in order to determine whether the amorphous metal articles sought to be imported fall outside the scope of paragraph 1 of this Order, and therefore should be allowed entry into the United States.
>
> 4. Persons desiring to import amorphous metal articles covered by this Order shall certify to the U.S. Customs Service that the amorphous metal articles sought to be imported were manufactured by a process that the U.S. International Trade Commission has determined to be outside the scope of paragraph 1 of this Order * * *.[5]

Allied appealed from the Advisory Opinion and from the Modified Exclusion Order.

ISSUES

(1) Whether this Court has jurisdiction over either appeal.
(2) Whether Allied waived its right to challenge ITC's claim construction.
(3) Whether ITC's finding of noninfringement under the doctrine of equivalents is supported by substantial evidence.[6]

OPINION

I. Jurisdiction

A. STATUTORY FRAMEWORK

Under 28 U.S.C. § 1295(a)(6) (1982) this court has exclusive jurisdiction over "the final determinations of the United States International Trade Commission relating to unfair practices in import trade, made under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337)." The "final determinations" appealable to this court are specified in section 337(c) (Supp. 1984):

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[5] Exclusion Orders requiring an importer to certify that the article sought to be imported was manufactured by a process that the Commission has determined would not infringe a U.S. patent if practiced in the United States are common where a process patent is at issue and there is no way to discern by inspection of the imported article whether that article was manufactured by an infringing process. *See Certain Multicellular Plastic Film*, Inv. No. 337-TA-54, *aff'd, Sealed Air Corp. v. United States Int'l Trade Comm'n*, 645 F.2d 976 (CCPA 1981).

[6] Allied's arguments concerning literal infringement deal only with claim construction and thus are entirely answered by our discussion of waiver, *infra*.

> The Commission shall determine, with respect to each investigation conducted by it under this section, whether or not there is a violation of this section * * *. Any person adversely affected by a final determination of the Commission under subsection (d), (e), or (f) of this section may appeal such determination, within 60 days after the determination becomes final, to the United States Court of Appeals for the Federal Circuit for review in accordance with chapter 7 of Title 5. Notwithstanding the foregoing provisions of this subsection, Commission determinations under subsections (d), (e), and (f) of this section with respect to its findings on the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, the amount and nature of bond, or the appropriate remedy shall be reviewable in accordance with section 706 of Title 5.

Section 337(d) reads:

> **(d) Exclusion of articles from entry**
>
> If the Commission determines, as a result of an investigation under this section, that there is a violation of this section, it shall direct that the articles concerned * * * be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health and welfare * * * it finds that such article should not be excluded from entry.

Section 337(h) is also of interest here:

> **(h) Period of Effectiveness**
>
> Except as provided in subsections (f) and (g) of this section, any exclusion from entry or order under this section shall continue in effect until the Commission finds * * * that the conditions which led to such exclusion from entry or order no longer exist.

B. Advisory Opinion

That an agency may choose to render advisory opinions cannot create for one displeased with its advice a cause of action cognizable in an Article III court. A federal court's jurisdiction is limited to that conferred by Congress. *See Palmore* v. *United States,* 411 U.S. 389, 401–402 (1973); *Sundback* v. *Blair,* 47 F.2d 378, 380, 8 USPQ 220, 222 (CCPA 1931) (rules of administrative agency alone cannot confer appellate jurisdiction); *see also Arctic Corner, Inc.* v. *United States,* 845 F.2d 999, 1001 n.2 (Fed. Cir. 1988).

ITC Advisory Opinions (19 C.F.R. § 211.54(a), (b) (1987)) are not reviewable by this court because they are not "final determinations" required by sections 337(c) and 1295(a)(6). Section 211.54(c) provides that "[t]he Commission may at any time reconsider * * * any advice given under this section and, where the public interest requires, rescind or revoke its prior * * * advice." ITC's published comments on § 211.54 state: "Since * * * advisory opinions are not binding, they

are not final orders and therefore not appealable." 46 Fed. Reg. 17,526, 17,527 (March 18, 1981) (citing *Floersheim* v. *Weinburger*, 346 F. Supp. 950 (D.D.C. 1972)) [hereinafter ITC Comments].

ITC's attempt here to create a distinction between determinations under § 211.54 that are "truly advisory," because they do not result from "formal proceedings of the APA type," and determinations under § 211.54 that are not "truly advisory," because they result from proceedings that "effectively determine[ ] [an issue] as a final matter," is disingenuous, as is its assertion that the Customs Service treats ITC advisory opinions as binding. This court's jurisdiction cannot be made to turn upon such manipulatable criteria.

What counts in determining our jurisdiction is not the nature or thoroughness of the agency proceeding, but the effect of the agency determination. We reject the notion that an agency may issue what it calls "advisory" opinions and attempt to make some appealable and some not appealable on the basis of its selection among types of proceedings, or on the basis of how those opinions are treated by other agencies such as the Customs Service. If ITC wants one of its pronouncements to have effect as a final determination, it knows how to accomplish that objective without issuing opinions that may or may not be "truly advisory."[7] Put simply, the lack of finality, inherent in the word "advisory" and set out in § 211.54(c) itself, dooms review. *Cf. Block* v. *United States Int'l Trade Comm'n*, 777 F.2d 1568, 1571, 228 USPQ 37, 38–39 (Fed. Cir. 1985) (rejecting ITC argument that terminating investigation is in effect a final determination).

ITC's reliance on *Canadian Tarpoly Co.* v. *United States International Trade Commission*, 640 F.2d 1322, 1325, 209 USPQ 33, 35 (CCPA 1981), is misplaced, for it does not support ITC's theory that some of its "advisory opinions" are appealable. *Canadian Tarpoly* was a petition for mandamus case involving an original exclusion order that, like the present Modified Order, and unlike the Amorphous Metal Exclusion Order, expressly provided for a subsequent proceeding to determine whether importation of a particular product would be allowed. An affirmative answer in that subsequent proceeding would automatically modify the existing exclusion order. Nothing in *Canadian Tarpoly* dealt with "advisory opinions" or § 211.54. Indeed, as there set out, petitioner declined ITC's suggestion that it seek an advisory opinion.[8]

Because we hold that this court has not been granted statutory authority to review ITC advisory opinions, we need not discuss the "case or controversy" provision of Article III of the Constitution. *See Ellis* v. *Brotherhood of Ry., Airline & S.S. Clerks*, 466 U.S. 435,

[7] It is well established that "[a]dvisory opinions differ from declaratory orders in their lack of reviewability and in their lack of binding effect * * *." K. Davis, *Administrative Law Treatise* § 4.09 at 265 (1958).

[8] In denying mandamus in *Canadian Tarpoly*, this court indicated that petitioner could appeal "if adversely affected by a final determination" in the modification proceeding. That view was repeated in *SSIH Equip. S.A.* v. *United States Int'l Trade Comm'n*, 673 F.2d 1387, 1390, 213 USPQ 529, 531 (CCPA 1982). At the time of *Canadian Tarpoly* and *SSIH*, there was no time set for appeal from original exclusion orders. Now that original exclusion orders become unappealable after 60 days, neither *Canadian Tarpoly* nor *SSIH* can be read as approving appeals from refusals to modify exclusion orders. That question is not before us in this case.

444 (1980); *Rescue Army* v. *Municipal Court,* 331 U.S. 549, 568–74 (1947).

C. The Modified Exclusion Order

NSC argues in a motion to dismiss that "this court has no jurisdiction to hear appeals from a modified exclusion order" because: (1) § 337(c) limits our review to ITC determinations under sections 337(d), (e), or (f); (2) authority for exclusion order modification proceedings is found in § 337(h); (3) § 337(d) is "completely silent as to exclusion order modification proceedings"; and (4) § 337(c) puts a 60-day limit on appeals.

NSC further argues that although this court "in specific procedural contexts has addressed appeals involving modified exclusion orders or arguably has stated it could do so," "all such cases were decided prior to the amendments to 19 U.S.C. § 1337 * * * placing a 60 day time limit on appeals from final determinations of the ITC."[9]

NSC's reading of § 337(c) is too restrictive in requiring a specific statutory provision for review of Modified Orders when the statute provides for review of original orders. NSC's view disregards the general rule that judicial review will not be precluded on the sole ground that specific procedures for judicial review of a particular agency action are not spelled out in a statute. *Traynor* v. *Turnage,* 108 S. Ct. 1372, 1378 (1988); *Bowen* v. *Michigan Academy of Family Physicians,* 476 U.S. 667, 670 (1986) ("strong presumption that Congress intends judicial review of administrative action"); *Fausto* v. *United States,* 783 F.2d 1020, 1022 (Fed. Cir. 1986), *rev'd on other grounds,* 108 S. Ct. 668, 673 (1988) (finding contrary Congressional intent); *Rosano* v. *Department of the Navy,* 699 F.2d 1315, 1318 n.13 (Fed. Cir. 1983); *see also* B. Mezines, J. Stein & J. Gruff, *Administrative Law* § 44.02 (1987 revision).[10] NSC cites no showing of " 'clear and convincing evidence' of a contrary legislative intent," *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 141 (1967), and we are aware of none.

The statutory scheme of section 337 and its accompanying legislative history evidence that Congress did not intend that NSC's overly restrictive view govern judicial review of final determinations on the merits made by ITC under sections (d), (e), and (f). *See* H. Rep. No. 571, 93rd Cong., 1st Sess. 78 (1974) ("Any order of the Commission entered in any proceeding would be subject to judicial review in the CCPA") (quoted in *LSI Computer Sys.* v. *United States Int'l Trade Comm'n,* 832 F.2d 588, 590 (Fed. Cir. 1987)); S. Rep. No. 1298, 93rd Cong., 2d Sess. 196–97 (1974), *reprinted in* 1974 *U.S. Code Cong. & Admin News* 7186, 7329 ("under section 337(c) the Committee would extend the right to judicial review of final Commission

[9] *See, e.g., SSIH Equip. S.A.* v. *United States Int'l Trade Comm'n,* 718 F.2d 365 (Fed. Cir. 1983), wherein this court reviewed a modified exclusion order.

[10] No case cited by NSC supports its argument that this court lacks jurisdiction to review a modified exclusion order. NSC's cases deal with the nonanalogous situations (administrative decisions apart from the merits; decisions declining to institute proceedings; decisions to terminate an investigation).

determinations (of whether there is a violation of section 337 or whether there is reason to believe there is a violation)"); *see also SSIH Equip. S.A.* v. *United States Int'l Trade Comm'n*, 673 F.2d 1387, 1390 n.9 (CCPA 1982) (§ 1337(c) is "expansive statement of reviewable determinations"); ITC Comments at 17526 ("[A]ctions construable as final Commission actions under the rules, such as substantive modifications to cease and desist orders and the entry or removal of exclusion orders, would be reviewable before the [CCPA]").

ITC finds authority to modify an existing exclusion order in § 337(h), *see* 5 C.F.R. § 211.57 (1987); *cf Young Engineers* v. *United States Int'l Trade Comm'n*, 721 F.2d 1305, 1312–13, 219 U.S.P.Q. 1142, 1148–49 (Fed. Cir. 1983); yet when it actually modifies that order and issues the modified order it is making an appealable final determination under subsection (d), (e), or (f). The order modifying the existing order inherently relates to the propriety of the exclusion order and affects its validity. *See Viscofan, S.A.* v. *United States Int'l Trade Comm'n*, 787 F.2d 544, 552, 229 USPQ 118, 124 (Fed. Cir. 1986). The result is the same as that which would prevail if ITC had issued the modified order in the first instance.

The lure of NSC's simplistic reading of the statute evaporates when one realizes that the exclusion and cease-and-desist remedies of sections (d), (e), or (f) come into play only when an investigation has resulted in a finding that section 337(a) has been violated. Under NSC's narrow reading of the statute, a final order refusing to exclude an import because the patent was held invalid would not be appealable. That result would be contrary to the expressed intent of section 337(c). *See* S. Rep No. 1298, *supra; see also Surface Technology, Inc.* v. *United States Int'l Trade Comm'n*, 801 F.2d 1336, 231 U.S.P.Q. 192 (Fed. Cir. 1986) (reviewing ITC determination of no violation of § 337; *Lannom Mfg. Co.* v. *United States Int'l Trade Comm'n*, 799 F.2d 1572, 231 USPQ 32 (Fed. Cir. 1986).

The 1984 amendment to section 337(c) mandating a 60-day time limit on appeals from final determinations under subsections (d), (e), or (f) has no effect on our jurisdiction here. Because the Modified Order is itself a final determination under subsection (d), Allied's appeal was timely. It is irrelevant that the appeal was more than 18 months after publication of ITC's Amorphous Metals Exclusion Order. *See Young Engineers*, 721 F.2d at 1312, 219 USPQ at 1149 (12 (or 18) month rule of § 337(b) "means only [that] the conclusion that there is a violation or no violation of § 337(a)" must be made within that time period).

II. Waiver

Allied waived review of the claim construction in the ALJ's 1984 ID by failing to raise the issue in its petition for review of that ID. *See Warner Bros.* v. *United States Int'l Trade Comm'n*, 787 F.2d 562,

564, 229 USPQ 126, 127 (Fed. Cir. 1986). Allied's effort to now litigate its claim construction issues is improper.

Allied not only waived review, but did so knowingly. ITC's rules require a concise statement of the reasons why review of the ID is necessary, 19 C.F.R. § 210.54(a)(ii), (iii), (iv) (1988), and provide that any issue not raised in the petition will be deemed abandoned, 19 C.F.R. § 210.54(a)(2) (1988). Moreover, Allied did far more than fail to argue; it affirmatively stated that the ALJ's construction was correct. *Lizut* v. *Department of the Army,* 717 F.2d 1391 (Fed. Cir. 1983) (petitioner's endorsement of Presiding Official's decision effected a waiver).

Allied's argument that ITC added further claim limitations in the 1987 proceeding is disingenuous. The ALJ's ID states that the '257's specification "indicates that the lips must have a certain width relative to the width of the slot of the nozzle." 1984 ID at 41. Further, the ALJ's finding 336 states that "the minimum width of the first and second lip are given in the specification." ITC's 1987 determination stated those same parameters.

Allied says "ITC's 1987 claim construction * * * convert[s] processes found infringing by ITC in 1984 to noninfringements" because "if the ITC incorporates the 'critical' lower limits in the claims, it must incorporate the no less 'critical' upper limits." The assertion fails because the 1984 and 1987 claim constructions are the same, that in 1987 being merely the listing of the actual parameters referred to in 1984 as being found in the specification. Moreover, Allied's point is that incorporation of the upper limits would have required a finding of noninfringement in 1984, which may account for Allied's failure to raise the argument in 1984. ITC consistently stated that it was not determining the upper limits that might fall within the scope of the '257 patent. What ITC might decide cannot, however, serve as a basis for reversal in this case. *Beloit Corp.* v. *Valmet Oy,* 742 F.2d 1421, 1423, 223 USPQ 193, 194 (Fed. Cir. 1984) ("this court does not sit to review what the Commission has not decided"), *cert. denied,* 472 U.S. 1009 (1985).

III. Doctrine of Equivalents

Allied's main attack on ITC's finding of nonequivalence rests on the argument that ITC erred in law by "compar[ing] the *lips* of the 'new' processes to the *lips* of Allied's preferred nozzle" (emphasis Allied's), rather than "compar[ing] the 'new' processes to the '257 claimed process." Allied's argument fails because ITC did not do that. ITC assumed that every step of the new process (other than wide lips) was substantially the same as the corresponding limitation found in the '257 process. ITC's opinion evidences that it considered the effect of the lone difference between the HML and VAC processes and the patented process on the working of those processes as wholes. The finding that neither wide lips nor equivalents of those lips were employed in the HML and VAC processes led to an

ultimate finding of nonequivalence between those processes and the patented process. That was not error. *See Spectra Corp.* v. *Lutz*, 839 F.2d 1579, 1582, 5 USPQ2d 1867, 1869–70 (Fed. Cir. 1988); *Pennwalt* v. *Durant-Wayland Corp.*, 833 F.2d 931, 934–36, 4 USPQ2d 1737, 1739–41 (Fed. Cir. 1987) (in banc), *cert. denied*, 108 S. Ct. 1226, 1474 (1988).

We have carefully reviewed the record in light of the remainder of Allied's arguments regarding equivalence and conclude that substantial evidence supports ITC's finding.

CONCLUSION

Allied's appeal from ITC's advisory opinion is dismissed for lack of jurisdiction. ITC's modified exclusion order is affirmed.

COSTS

Each party will bear its own costs.

DISMISSED-IN-PART AND AFFIRMED-IN-PART

(Appeal No. 87–1627)

TEXAS INSTRUMENTS INC., APPELLANT *v.* U.S. INTERNATIONAL TRADE COMMISSION, APPELLEE, AND SAMSUNG CO., LIMITED AND SAMSUNG SEMICONDUCTOR & TELECOMMUNICATIONS CO., LIMITED, INTERVENORS

Hal D. Cooper, Jones, Day, Reavis and Pogue, of Cleveland, Ohio, argued for appellant. With him on the brief were *Robert C. Kahrl*, *James L. Wamsley, III* and *Leonard L. Lewis*.

Michael Buchenhorner and *Thomas O'Connell*, Office of the General Counsel, U.S. International Trade Commission, of Washington, D.C., argued for appellee. With them on the brief were *Lyn M. Schlitt*, General Counsel and *James A. Toupin*, Assistant General Counsel.

William K. West, Jr., Cushman, Darby & Cushman, of Washington, D.C., argued for intervenor Samsung. With him on the brief were *Michael L. Keller*, *Charles R. Donohoe*, *Peter W. Gowdey*, *Laurence Harbin*, *John E. Gartman* and *Lynn E. Eccleston*.

Appealed from: U.S. International Trade Commission.

ORDER

The United States International Trade Commission (ITC) moved for dismissal on the grounds of mootness, that portion of the appeal of Texas Instruments Incorporated (TI) asserting the ITC erred in holding United States Letters Patent No. 3,541,543 ('543) unenforceable due to inequitable conduct before the United States Patent and Trademark Office (PTO). By an unpublished order, this court deferred the motion to the merits panel for consideration. *Tesax In-*

struments Inc. v. *United States Int'l Trade Comm'n,* No. 87–1627 (unpub. order March 10, 1988).

I. The Disposition Below

The '543 patent discloses and claims a structure for a decoder circuit useful for converting binary numbers into a decimal number display. In 1986 TI filed a complaint with the ITC charging nineteen different parties with violating United States tariff laws by importing 256K and 64K dynamic random access memory devices (hereinafter chips). TI alleged that the chips were manufactured outside the United States and that they infringed numerous TI patents, including the '543 patent. The administrative law judge (ALJ) in the initial determination found no violation of section 337, 19 U.S.C. § 1337 (1982 & Supp. IV 1986), with respect to the '543 patent. She did, however, determine that claims 10, 13, 18, and 25 of the '543 patent were invalid for anticipation and obviousness under 35 U.S.C. §§ 103, 102 (1982 & Supp. IV 1986), respectively. The ALJ also held the '543 patent unenforceable due to inequitable conduct before the PTO. *In re Certain Dynamic Random Access Memories, Components Thereof and Products Containing Same,* Inv. No. 337–TA–242, slip op. at 223 (Int'l Trade Comm'n May 21, 1987) (hereinafter *DRAM).* The ITC, declining to review the ALJ's findings and conclusions with respect to the '543 patent, allowed them to become final on September 21, 1987. 19 C.F.R. § 210.53(h) (1987).

II. Mootness

In its motion to dismiss for mootness, the ITC contends that even if TI prevails on appeal, the law provides for no remedy because (1) the '543 patent expired on November 17, 1987, and (2) TI waived its right to appeal the invalidity and noninfringement issues because it appealed to this court only the unenforceability issue. We agree.

The ITC has a limited statutory mandate. Once the ITC determines that a party has violated the tariff laws, it may provide the injured party with the remedies set forth in section 337(d)–(f) of the Tariff Act of 1930, 19 U.S.C. § 1337(D)–(f) (1982). The ITC can issue only an exclusion order barring *future* importation or a cease and desist order barring *future* conduct. If the violation of section 337 involves patent infringement, neither of the above remedies is applicable once the patent expires. *Cf. Kinzenbaw* v. *Deere & Co.,* 741 F.2d 383, 386–87, 222 USPQ 929, 931 (Fed. Cir. 1984) (holding injunctive relief is not available after the patent expires), *cert. denied,* 470 U.S. 1004 (1985). Thus, even if the ITC had determined that the '543 patent was enforceable, valid, and infringed, there is no remedy that the ITC could have granted TI because the patent had expired. Therefore, the expiration of the '543 patent has rendered this portion of the appeal moot.

However, the question still remains what effect, if any, will the ITC's determination that the '543 patent is unenforceable due to in-

equitable conduct have on the ability of TI to enforce this patent in other litigation. Although this court has stated that the ITC's determinations regarding patent issues should be given no res judicata or collateral estoppel effect, *Tandon Corp.* v. *United States International Trade Commission*, 831 F.2d 1017, 1019, 4 USPQ2d 1283, 1285 (Fed. Cir. 1987), TI contends that it has a definite and real concern that the ITC's determination will impair its future efforts to enforce its patent portfolio. As an example, TI cites the defense Samsung raised in federal district court litigation with TI in which TI asserted the infringement of eight of its patents, including the '543 patent. Samsung contended that under the decision of *Keystone Driller Co. v.* General Excavator Co., 290 U.S. 240 (1933), the unenforceability of the '543 patent rendered TI's entire portfolio unenforceable. *Texas Instruments Inc.* v. *Fujitsu, Ltd.*, Civ. No. CA3–86–0259–H (N.D. Texas January 15, 1988). TI also argues that a *Walker Process* type defense may be asserted against it in the future if the ITC's unenforceability determination stands. *See Walker Process Equip., Inc.* v. *Food Machinery and Chemical Corp.*, 382 U.S. 172 (1965) (stating that fraudulent procurement of a patent can form basis of antitrust claim).

Even if TI's argument had merit, the established practice in dealing with civil cases that become moot while on their way through the appeal process is to "reverse or vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear*, 340 U.S. 36, 39–40 (1950). *See also Kinzenbaw*, 741 at 386–87, 222 USPQ at 931. "That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *Munsingwear*, 340 U.S. at 39–40. This is such a case. We, therefore, hold moot that portion of the appeal directed to the '543 patent.

Accordingly,

IT IS ORDERED that:

That portion of the ITC's final determination relating to the '543 patent is vacated and the case is remanded to the ITC with instructions to dismiss as moot the portion of the complaint relating to that patent.

Dated: July 6, 1988.

FOR THE COURT,
JEAN GALLOWAY BISSEL,
Circuit Judge.

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